Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of Amendment of Rules and Policies Governing Pole Attachments	CS Docket No. 97-98

COMMENTS OF
THE EDISON ELECTRIC INSTITUTE
AND
UTC, THE TELECOMMUNICATIONS ASSOCIATION

Dated: June 27, 1997

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SUMMARY

Preliminarily, EEI and UTC will not address the creation of a pole attachment rate for transmission facilities or rights-of-way in these comments. As we have already stated to the Commission, transmission facility and rights-of-way are not properly part of the scope of this proceeding because they are still subject to the still ongoing prior proceeding regarding interconnection and access. Further, we do not believe that the FCC even has jurisdiction over attachments of wireless equipment. In any event, the Commission's proposal would be completely inappropriate if applied to transmission facility or attachments of wireless equipment, which is significantly different from use for wireline attachments.

The FCC should rely on negotiations and market forces to set pole attachment rates, and should not abrogate the rate portion of existing agreements. The FCC must not develop any rate formula that imposes rates lower than the rates that have resulted from voluntary negotiations, especially if that could result in the abrogation of existing contracts. Any rate formula established by the Commission should be based on the full recovery of all forward-looking replacement costs associated with pole attachments, as only this approach satisfies reasonable expectations about the value of infrastructure investments. The proposed formula does not even adequately provide for the recovery of historic costs, much less replacement costs, although

it purports to be a cost-based formula.

If the Commission nonetheless continues to rely on a rate formula, that formula must allow utilities to recover forward-looking costs. If the FCC imposes a rate formula, it should not attempt to create regional or demographic variations. Utilities, however, must be permitted to deviate from that formula upon a *prima facie* showing that its circumstances warrant different treatment.

Recognizing that electric utility ducts and conduit are substantially different from telecommunications duct and conduit, the FCC should clarify what is meant by those terms, at least for electric utilities. Electric utility underground facilities are subject to rigid safety requirements that strictly limit the ability to engage in joint use for both power and communications purposes. This restriction makes the FCC's "half-duct" convention conceptually inaccurate, and unreasonable and unjust if applied to electric utility underground facility.

The FCC's approach to cost recovery seriously under-reflects actual pole costs. In particular, "safety space" is not "usable" space for utilities, and is not even used solely **by** utilities. Further, it is not necessarily limited to 40 inches. And, various appropriate methods exist for allocating safety space to attaching entities. Thus, the formula's allocation of all costs of safety space to facility owners results in an unfair subsidy of the benefits received by attaching entities.

Attachments by means of overlashing must be subject to separate, full attachment rates. All attachment rates, moreover, must more accurately reflect the full range of costs associated with constructing and owning distribution poles. Also, any formulaic pole attachment rate must be calculated using gross book value consistently – the FCC's proposed method does not do so.

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INTRODUCTION

Pursuant to Section 1.415 of the Commission's Rules, the Edison Electric Institute (EEI) and UTC, the Telecommunications Association (UTC)[1/] respectfully submit the following Comments on the Commission's Notice of Proposed Rulemaking herein, released March 14, 1997 (hereafter, the "Rate NPRM"), seeking comment on proposed modifications to the Commission's rules relating to the rates utilities may charge for attachments to utility poles, ducts, conduits, or rights-of-way, generically referred to as

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1/ UTC the Telecommunications Association, was formerly known as the Utilities Telecommunications Council.

"pole attachments."[2/] EEI and UTC are pleased to offer the following comments on the FCC's proposal. As the principal representatives of the utilities most directly affected by the FCC's interpretation and implementation of the Pole Attachment Act (modifying Sec. 224 of the Communications Act of 1934, codified at 47 U.S.C. Sec. 224), as amended by Section 703 of the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 149-151 [Feb. 8, 1996]; hereafter, the "Act"), both EEI and UTC have a direct interest in this proceeding.

EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. EEI's U.S. members serve 99 percent of all customers served by the shareholder-owned segment of the U.S. industry. As of October 1995, they generated approximately 79 percent of all the electricity generated by electric utilities, and serviced 76 percent of all ultimate customers in the nation. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

UTC is the national representative on telecommunications matters for electric, gas, and water utilities and natural gas pipelines. Well more than 1,200 utilities and pipeline companies are members of UTC, ranging from small rural electric

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2/ 62 Fed. Reg. 18,074 (Mon., Apr. 14, 1997); *see* 62 Fed. Reg. 26,465 (Wed., May 14, 1997).

cooperatives and water districts to large combination electric-gas-water utilities serving millions of consumers. UTC has a longstanding working relationship with the Commission, and frequently represents its members in proceedings before the Commission.

DISCUSSION

Transmission Structures, Wireless Attachments, And Rights-Of-Way Should Not Be Addressed In This Proceeding

In the FCC's final rule implementing the access provisions of the Act (CC Dock. 96-98, *et al.*, 61 F.R. 45,476 [Th. 8/29/96]; hereafter, the "Access Order"), the FCC stated (at Par. 1184) that "the breadth of the language contained in section 224(f)(1) [implies] that Congress ... intend[ed] to include transmission facilities" within the scope of poles and rights-of-way.[3/] EEI and UTC asked the FCC to reconsider its initial determination that transmission structures were poles or rights-of-way under the Act (*see* EEI/UTC Comments on Petitions for Reconsideration/ Clarification, at 3-4, and n.4 at 4 [Oct. 31, 1996]). The Commission has issued no final decision.

As that issue remains unresolved, it is still solely the subject of the prior, and still ongoing, proceeding. The issue

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3/ *See also* Access Order, Par. 1186, indicating that access was mandated for all types of telecommunications equipment.

should not be interpreted in this proceeding based upon an assumption of the outcome in another proceeding. Rather, the Commission should not address it until after it has issued its decision on reconsideration or clarification of the Access Order.

In Sec. II, Par. 5, of the Rate NPRM, the FCC stated that "[t]he formula proposed in this Notice will apply to attachments ... within ... rights-of-ways ..." (*also see* Par. 1). That language could be taken to mean that the FCC intends its proposed interim pole attachment formula to have wider impact than just to distribution plant. Distribution facilities traditionally have been the primary type of plant sought for pole attachments. In other words, some might argue that the "pole" rate ought to be applied to (1) "attachments" to rights-of-way *per se*, (2) attachments to transmission facility, and (3) all attachments for <u>wireless</u> telecommunication equipment – virtually any use of utility facility by wireline or wireless telecommunications providers.

As noted above, the FCC has not yet finalized its position regarding the applicability of the Act to transmission facilities. In the Access Order, the Commission said that Congress intended to permit access to <u>distribution</u> facility, not "to every piece of equipment or real property owned or controlled by the utility." Access Order, Par. 11185. Even more significant are the facts that the Act did not change the **scope** of the facility addressed by the pole attachment provisions: utility

poles, ducts, conduits, and rights-of-way, and the Commission has never before included the costs of transmission facilities in its pole attachment rate calculations. Therefore, transmission structures are simply **not** "poles" under the Act.

For all of the above reasons, the issue of a "pole" attachment rate for attachment to transmission facilities simply should not be part of this proceeding. Moreover, and apart from the unresolved legal issues, the FCC's proposed interim formula is unable to adequately reflect the costs of rights-of-way, as well as the costs of transmission plant. The FCC has not even hinted at how to determine an appropriate formula for the costs recorded in utility land and land rights ("rights-of-way") accounts established by the Federal Energy Regulatory Commission (hereafter, "FERC").[4/] Other problematic issues related to these matters are access and other limitations on rights-of-way, taxes, safety, reliability, and obtaining permits and other consent. For those reasons, EEI's and UTC's comments herein will not address rates for access to rights-of-way.

Moreover, EEI's and UTC's comments also will not address the applicability of the FCC's proposed interim formula for

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4/ *See* FERC Accounting requirements: 18 C.F.R. Part 101, Uniform System of Accounts for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, I FERC Rep. (C.C.H.) ¶¶ 1500, *et seq.* (hereafter, "utility accounts" or "FERC accounts").

developing rates for attachments to transmission facility, or for wireless attachments to any utility property. We do not believe the Commission has jurisdiction over wireless attachments. The Act's access and rate requirements are not applicable to wireless attachments. In addition, there are simply too many unique variables related to such attachments to recommend a single formula that would apply to both wireline and wireless attachments.

Further, the FCC's proposed formula is an inappropriate starting point for developing a transmission facility or wireless attachment rate. Siting wireless equipment is usually the reason for seeking attachments to transmission structures. It is for that reason, for instance, that existing joint-use arrangements with LECs and existing cable television attachment agreements have never covered transmission structures. However, the FCC's pole formula clearly reflects **none** of the extremely high costs of installing and maintaining transmission structures. The Commission has not even begun looking at the distinctly different utility accounts that would have to be used to develop a rate formula for transmission structures.

In addition, there is no economic reason to apply "pole" rates to attachments for wireless equipment – those attachments should be subject only to market rates. There is no need for a "default" rate for wireless attachments given the innumerable potential attachment sites available. Even a cursory analysis of

the current deployment of wireless services demonstrates that there is extremely wide availability, and diversity in the types, of wireless sites. *See, e.g.*, WinStar Communications "request for clarification" of the FCC's access rule, at 3, arguing that access to poles, ducts and conduit is of "virtually no use" to wireless providers because the configuration of their systems "avoids the need for these conventional [forms of] right-of-way." In fact, efficient wireless siting actually **demands** that more sites be available than could possibly be provided by utility facility. For these reasons, utilities demonstrably have no ability ("natural" or otherwise) to demand monopoly rents for wireless sites. Because of just such considerations, the New York Public Service Commission recently decided to forego stipulating rates for wireless attachments, instead simply urging parties to negotiate. Opinion No. 97-10, Opinion and Order Setting Pole Attachment Rates, Case 95-C-0341, In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095 (June 17, 1997) (addressing transmission facilities as well as attachments for wireless equipment).

Market Rates Are A Better Reflection Of Appropriate Pole Attachment Rates Than Is The FCC's Formulaic Rate Proposal Herein

By commenting on the Commission's proposed interim rate formula EEI and UTC do not intend to suggest that we accept the Commission's premises for its pole attachment rate formula proposal. EEI and UTC appreciate the FCC's concerns that it must ensure that pole attachment rates be just and reasonable.

However, a cost-based formula is not required to satisfy the Act.

EEI and UTC also do not agree that the FCC's "cost-allocative" proposal as set forth in the Rate NPRM is the most appropriate means for creating an appropriate rate while, simultaneously, ensuring equitable cost recovery for the use of existing utility plant by attaching entities. The Commission's approach results in an unfair subsidy by electric utilities of new telecommunications entrants. The FCC's approach requires attaching entities to pay only a small fraction of what they would pay to construct new facility themselves, thus discouraging facility owners from making future infrastructure investments. EEI and UTC urge the FCC to allow utilities to develop pole attachment rates based on market rates, especially where those "market rates" can be determined by reference to existing freely negotiated agreements that are based on full replacement or other forward-looking methodologies (or any other reasonable technique, such as market surveys).

Existing Agreements Reflect The Efficient "Market" Price

The United States Constitution mandates equitable cost recovery for the public use of private property. *See, e.g.*, Yee v. Escondido, 503 U.S. 519, 522 (1992); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); Bell Atlantic Tel. Cos. v. FCC, 1441, 1445 (D.C. Cir. 1994). This includes the recovery (1) of reasonable, investment-backed expectations and (2) for loss of the exclusive use of the

affected property. *See, e.g.*, (1) Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989); First English Evangelical Church v. County of Los Angeles, 482 U.S. 304, 315 (1987); FPC v. Hope Natural Gas Co., 320 U.S. 591,605 (1944); Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896); Monongahela Navigation Co. v. United States, 148 U.S. 312, 343 (1893); and (2) Dolan v. City of Tigard, 129 L.Ed.2d 304, 316 (1994); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Market rates clearly allow for such cost recovery, whereas the rate formula proposed by the FCC will not.

Moreover, there is no need to develop restrictive, prescriptive pole attachment rates for poles, ducts, or conduits where ample alternative infrastructure providers exist. Such regulation is only necessary in the absence of freely negotiated rates – *i.e.*, the absence or failure of a market. There is no need to supplant freely negotiated rates.

In fact, there is a robust "market" - efficient and equitable - which has made available poles, ducts, conduits, and other infrastructure assets for use by telecommunications providers. That market is a far more accurate and fair measure of the true value of such facility than any regulatory rate formula. This market has created the equivalent of market rates for pole attachments, and has been relied upon for many years.

This market consists of existing agreements for the joint use of poles. The rates in these agreements do not reflect

monopoly rents. They reflect, instead, the mutual sharing of burdens attributable to facilities which provide a mutual benefit to all the parties. These negotiated agreements have promoted the rapid development of new or upgraded infrastructure at the lowest cost for all interested parties.

Further examples of the reasonability of existing cost- and benefit-sharing arrangements are the many existing agreements between utilities and competitive telecommunication providers. This is an additional market that exists in large part because of utility efforts to use temporary infrastructure excesses, where compensated use by third parties would not compromise the primary utility use. The agreements made in this "market" have been satisfactory to attaching entities because they reflect true costs and benefits, not monopoly rents.

They reflect all the valuable considerations normally made as part of a freely negotiated package of services and benefits, such as time-to-market, dispute avoidance, and maintenance, construction, and partnership, as well as non infrastructure opportunities such as service resale. These agreements are, essentially, "market rates," and they serve as well to reflect full replacement cost, as they are reached with the knowledge that new facility is the primary alternative to the use of utility facility. They reflect the value placed on that next best available alternative by the attaching entity.

Moreover, the competitive telecommunication providers who

are parties to existing market agreements are sophisticated trading partners, able to bargain fully and fairly for the most advantageous arrangement. In fact, they - or their parents or financial backers - are typically larger, better financed, and more experienced at negotiating these types of agreements than are electric utilities. They include some of the largest, most aggressive, most successful of modern enterprises such as AT&T, MCI, TCI, Time Warner, and Metromedia. They can - and should - assume more responsibility for the costs of infrastructure than was the nascent cable industry.

There are also some alternatives to electric utility sites, such as roadways and railroad or pipeline rights-of-way. These, too, serve to create an upper bound to the rates in existing agreements. Nonetheless, even in those alternate locations new facilities would often have to be built to accommodate telecommunications equipment. Thus, the approximation of replacement costs currently reflected in existing agreements is the closest thing to an efficient market price available for pole attachments.

A Rate Formula Runs Counter To The Spirit Of The Act

The FCC must not run counter to the very well-spring of its authority in this matter — the impetus toward rate ***de***regulation. Given the robust market for electric utility infrastructure assets, it would be ill-advised for the Commission to create a highly restrictive regulatory regime relying on a rate formula

that yields rates lower than existing, freely agreed-upon arrangements for sharing all relevant expenses. In particular, the FCC cannot justify reopening freely negotiated contracts. To do so in order to change only the rate (substituting a rate derived from an embedded-cost formula for a freely negotiated rate) would ignore, and so allow to go unrecovered, all the myriad costs considered during the negotiation and development of such contracts.

The FCC's proposal also creates no incentive for the development of additional infrastructure. Although all of the cost and risk of installing additional space fall on the utility, there is only the remote possibility of recovering a portion of the associated expense, because most often (especially for underground facility) new facility costs much more than reflected in embedded costs. This runs counter to the intent of the Act to encourage new facility.

As eloquently stated in a communication to EEI by Minnesota Power, "[t]he use of formulas that subsidize pole attachments and conduit rental at below market rates may have the unintended result of encouraging the continued use of outdated technology[, discouraging innovations such as] a single installation of fiber optic cable owned by one entity who will then lease band width to other users. This would cut down on the number of attachments, reduce pole loading, and greatly simplify field operations [as well as improve appearance, thereby reducing the various adverse

impacts of public opposition based on esthetic concerns]. Formulas that continue to encourage multiple attachments of copper or coaxial cable, or multiple attachments of low capacity fiber tend to shift the economics of the industry and discourage companies from investing the capital necessary to build the broad band fiber network that will be necessary for the implementation of the new technologies coming in telecommunications."

The FCC Must Respect Existing Agreements And Must Allow All Relevant Costs To Be Recovered

Section 703(e)(1) of the Act encourages voluntary agreements regarding attachment rates, providing for FCC intervention only where parties fail to resolve disputes over pole attachment rates. There is no policy or legal reason the ability to freely negotiate and contract should be delayed or postponed until February 2001. To the contrary, the entire thrust of the Act is to require even true competitors to negotiate.

Moreover, attempting to track every inch of space and every penny of costs, allocating those amounts to usable, nonusable, and common space, and then apportioning them to attaching entities, can impose a very heavy administrative burden, particularly for smaller utilities. Given that electric utilities are downsizing and otherwise attempting to become more competitive as the industry is reorganized, it is unreasonable to indiscriminately impose on all utilities such a burden in the first place. In addition, the costs of such a burden, where imposed against the wishes of a particular utility, could

unnecessarily increase the cost of attachments.

Thus, the FCC should respect the terms of a freely agreed-upon attachment agreement as it was intended to be – an entire package. The Commission must not focus on price alone. Nonetheless, if the FCC insists upon using a formulaic, cost-allocative, "accounting" methodology, the formula proposed by the FCC in this proceeding must be modified to account for more of the real costs actually related to utility facility.

The FCC Must Be More Open To Showings Of Differing Circumstances

Finally, as a general matter, many members of EEI and UTC report that, in their experience, the Commission is not adequately sensitive to the differences among utilities resulting from their various circumstances. Where state or local regulations or other demographic differences (such as regarding pole size or required safety space, as discussed below) materially affect the application of an FCC presumption, the Commission should accept any necessary change to that presumption. Utilities should be allowed to adjust the basic formula upon a *prima facie* demonstration that their situation is different from the presumed "average" embodied in the formula. In particular, such a "presumption of reasonable variability" should be applied if the FCC chooses to adopt a formulaic rate approach.

Forward-Looking Costs

As discussed above, a market-based approach to developing rates is best. Parties should be encouraged to enter negotiated rate agreements. Nonetheless, if the FCC chooses instead to follow a formulaic, cost-allocative, "accounting" approach, it should use a methodology similar in theory and intent to its Total Element Long Run Incremental Cost (TELRIC) pricing rules for competitive access to incumbent local exchange carrier services and facilities.

If a formula must be used at all, it should use forward-looking cost estimates rather than relying solely on recorded data. Rather, booked accounting data should be considered only as a starting point for forward-looking estimates. We expect several member companies to provide detailed economic analyses in their own comments, but overall EEI and UTC assert that pole rental rates based on forward-looking costs are an appropriate cost-recovery methodology.[5/]

5/ For instance, some versions of such a method could avoid the imposition of certain differing "make-ready" charges on different entities simply because they attach at different times. Under such methodologies, those particular "make-ready" expenses would be estimated once, ahead of time, and included in the forward-looking rental rate. (Although pole expenses based on replacement costs of poles might be somewhat higher under such an approach, carrying charges would be somewhat lower.) Other acceptable variations on forward-looking methodologies are also possible.

Forward-looking rate methodologies send the correct price signals, comply with economic principle of efficient costing and pricing, and are an efficient way to allocate resources. Moreover, if a formula is used, it must - whatever its basis - capture all pole-related costs. We make more specific mention of such costs below, in discussing various utility accounts.

Single Formula

Although market rates are most appropriate, if the Commission insists on developing a formulaic rate, the Commission should not attempt to anticipate regional or demographic variations. No simple formula - no matter the variations it may have - is as accurate a measure of actual demographic variations in costs as are actual market rates. However, in the absence of a market-based approach, it would be more conducive to regulatory certainty and, by that, greater market stability, to avoid regional or urban/rural formulas. Permitting deviations from such a formula whenever they make a prima facie case justifying such a departure, as noted above, is the most efficient means for recognizing regional and demographic variations.

Ducts and Conduits

EEI and UTC applaud the FCC for its initial efforts to reflect the differences between the utility and telecommunications industries. However, the FCC must recognize

that telephone company equipment differs from electric utility equipment far more even than the Commission has already recognized. Nowhere are these differences more apparent than regarding underground facility. It is underground facility that Congress apparently had in mind when crafting the reference in the 1996 Telecommunications Act to "ducts and conduit."

Definitions Must Be Consistent

To start with, a common set of definitions should be used when discussing conduit/duct issues, at least as for electric utilities. In the electric utility industry, the NESC definitions are preeminent (even if in state regulations or common parlance there may be other or less strict usage of terminology). The NESC (at p.176) defines electric "duct" as a single enclosed raceway (*i.e.*, one pipe); "conduit" as comprising one or more ducts (*i.e.*, a bundle of pipes, sometimes called a "duct bank"); and a "conduit system" as including conduits, manholes, vaults, etc. (*i.e.*, the conduit and all structures related or appurtenant thereto). "Inner" duct allows one duct to be treated more like a conduit.

In addition, the FCC must recognize that there is an important difference in meaning between the term "demarcation point" as used by telephone companies, and the electric utility term "point of entry." Many attaching entities appear to believe that power utilities control all ducts into and throughout multi tenant or multistory buildings. On the contrary, utility

ownership or control usually ceases outside of such buildings, such as at (or just outside of) utility vaults. *See, e.g.*, FERC Accounts 371 and 372.

Underground Facility, In Particular, Is Unique

There is a sharp difference between electric utility duct and conduit and similar facility in the telecommunications industry. Telephone company and electric utility duct banks and conduit systems are totally different. For instance, electric utility conduit systems are, with few exceptions, installed at greater depths than are those of communications systems, to accommodate the various safety requirements for the higher voltage levels of electric system equipment. It is for such reasons that telephone companies and electric utilities normally do not execute agreements concerning the joint use of duct banks or conduit systems, although they have routinely entered joint trench agreements.

All energized utility equipment is inherently dangerous, but underground utility equipment is particularly hazardous. For instance, arcing, which produces fires and explosions (with resulting outages) is a constant concern. Also, exposure to poisonous gases is a serious risk. For such reasons, joint occupancy at underground locations requires much more stringent engineering and work practices to ensure worker safety and service reliability.

Underground Reserved Space

The essential differences between the underground facility constructed by electric utilities and by telecommunications companies also impacts the issue of reserved space for underground facility. Electric utilities put extra space into conduits (creating redundancy) for emergencies – to satisfy their **current** need for reliability. For instance, in case of a duct collapse or other catastrophic failure, this reserved duct would be used immediately to restore service and maintain service reliability. Under such emergency conditions, there is not even time to remove an existing telecommunication user's equipment, much less build additional underground facility. Reserved underground space is not reserved or appropriate for future nonutility use, even if it can accommodate some future electric system expansion with it.

Therefore, reserved power supply duct space must be considered unavailable for non supply purposes. In fact, once duct is used for telecommunications purposes, the utility can no longer use it to maintain power supply reliability, and almost never reclaimed. Only for telephone ducts can there truly be considered alternate paths and the possibility of joint use.

Underground Usable Space

The FCC's proposed "half-duct convention" (Rate NPRM Pars. 44-46) is **not** appropriate for electric utilities because of NESC (and other) safety restrictions on joint use of a duct by supply